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No. 94-1188

In The

Supreme Court of the United States

October Term, 1994

AMERICAN PRESIDENT LINES, LTD., and
AMERICAN PRESIDENT COMPANIES, LTD.,

Petitioners,

v.

GAMMA-10 PLASTICS, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF ASSURANCEFORENINGEN SKULD, THE BRITANNIA STEAM SHIP INSURANCE ASSOCIATION LIMITED, THE JAPAN SHIP OWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, THE LONDON STEAMSHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED, THE NEWCASTLE PROTECTION AND INDEMNITY ASSOCIATION, THE NORTH OF ENGLAND PROTECTING AND INDEMNITY ASSOCIATION LIMITED, THE STANDARD STEAMSHIP OWNERS' P & I ASSOCIATION (BERMUDA) LIMITED, THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LIMITED, THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, AND THE WEST OF ENGLAND SHIPOWNERS' MUTUAL INSURANCE ASSOCIATION (LUXEMBOURG) IN SUPPORT OF PETITIONERS

CHESTER D. HOOPER
Counsel of Record
HAIGHT, GARDNER, POOR & HAVENS
195 Broadway
New York, New York 10007
(212) 341-7244
Attorney for Amici Curiae

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Movants, Assuranceforeningen Skuld, The Britannia Steam Ship Insurance Association Limited, The Japan Ship Owners' Mutual Protection and Indemnity Association, The London Steamship Owners' Mutual Insurance Association Limited, The Newcastle Protection and Indemnity Association, The North Of England Protecting and Indemnity Association Limited, The Standard Steamship Owners' P & I Association (Bermuda) Limited, The Steamship Mutual Underwriting Association (Bermuda) Limited, The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited, and The West of

England Shipowners' Mutual Insurance Association (Luxembourg), move the Court for permission to file an *amicus curiae* brief in support of the petition for certiorari filed by American President Lines, Ltd., and American President Companies, Ltd.

Petitioners have given their consent to the filing of movants' proposed brief, and a copy of their attorney's letter granting consent is being filed with the Clerk of the Court. Consent has been requested from counsel for the respondent, but as of this date such consent has not been granted. Movants accordingly file this motion pursuant to Rules 21.2(b) and 37.2.

Movants comprise ten mutual insurance associations known as "protection and indemnity clubs" (often abbreviated as "P&I clubs"). P&I clubs are "associations of shipowners banded together to spread and absorb liabilities falling on their members." GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 76 (2d ed. 1975); *see also* LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 386-418 (3d ed. 1991); 2 ALEX L. PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 832.1043 (1987); CHRISTÖF F. LUDDEKE, MARINE CLAIMS 1-5 (1993); William R.A. Birch Reynardson, *The History and Development of P&I Insurance: The British Scene*, 43 TUL. L. REV. 457 (1969); John P. Kipp, *The History and Development of P&I Insurance: The American Scene*, 43 TUL. L. REV. 475 (1969). Movants' members are owners and operators of ships of practically all maritime nations. In the aggregate, movants insure approximately 40,000 vessels totaling more than 400,000,000 gross registered tons. This represents a majority of the world's ocean-going commerce. Movants protect their

members in respect of substantially all liability risks that arise in the operation of vessels in international maritime commerce.

One significant liability risk for which movants insure their members is the risk that vessel owners will be held liable to cargo owners for the loss of or damage to cargo carried on their vessels. *See, e.g.*, BUGLASS, *supra*, at 410-411; PARKS, *supra*, at 965-982; John C. Moore, *Liability for Damage to Property Carried, to be Carried, or Which Has Been Carried*, 43 TUL. L. REV. 582-583 (1969). Thus the movants have a vital interest in the proper interpretation of the legal standards under which liability may be imposed. It is essential to the efficient operation of movants' business that rules imposing liability be clear and predictable, thus enabling parties to make rational decisions about how to insure their potential liabilities. Clear and predictable rules also enable parties to settle their disputes – when disputes arise – without resort to expensive and burdensome litigation.

The conflicts among the circuits at issue in the present case defeat the clarity and predictability on which movants depend in insuring their members. The decision below is particularly damaging, as it undermines movants' ability to rely on the tariffs filed by their members or on the bills of lading that members issue. Tariffs and bills of lading are essential documents on which everyone in the industry, including insurers, must rely. Accordingly, it is very important that the conflicts raised here be resolved, and that the erroneous views of the courts below be corrected.

IV

For these reasons, movants respectfully request leave to file the attached *amicus curiae* brief in support of the petition for certiorari filed by American President Lines, Ltd., and American President Companies, Ltd.

CHESTER D. HOOPER
Counsel of Record
HAIGHT, GARDNER, POOR & HAVENS
195 Broadway
New York, New York 10007
(212) 341-7244
Attorney for Movants

February 6, 1995

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Assuranceforeningen Skuld, The Britannia Steam Ship Insurance Association Limited, The Japan Ship Owners' Mutual Protection and Indemnity Association, The London Steamship Owners' Mutual Insurance Association Limited, The Newcastle Protection and Indemnity Association, The North of England Protecting and Indemnity Association Limited, The Standard Steamship Owners' P & I Association (Bermuda) Limited, The Steamship Mutual Underwriting Association (Bermuda) Limited, The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited, and The West of England Shipowners' Mutual Insurance Association (Luxembourg) respectfully submit this brief as *amici curiae* in support of the petition for certiorari filed by American President Lines, Ltd. ("APL"), and American President Companies, Ltd.

INTEREST OF AMICI CURIAE

The interest of *amici curiae* is explained in the motion filed in conjunction with this brief. *See* supra pages II-III.

SUMMARY OF ARGUMENT

The current case is typical of thousands of transactions that occur every year. Ocean shipments are carried on standard terms, and the relevant provisions in APL's standard-form bill of lading are essentially the same as those of most other ocean carriers. The factual situation is also not unusual. This case thus offers an ideal vehicle to

resolve the issues presented in a context that will be applicable to the entire industry.

To deny APL the benefit of its standard-form bill of lading in this situation imposes an unreasonable burden on the entire shipping industry – essentially depriving the industry of the benefit of standard-form contracts. This will benefit no one, and will simply increase costs that will ultimately be passed on to consumers.

There is no legitimate basis for the so-called "fair opportunity" doctrine, and the Court should take this opportunity to reject it. The burden of the intercircuit and international conflicts affects everyone in the industry, and the mere existence of the doctrine is an invitation to pointless litigation.

ARGUMENT

1. The Current Case Offers an Ideal Vehicle to Resolve the Issues Presented in a Context that will be Applicable to the Entire Shipping Industry.

The facts of the present case are entirely typical of thousands of transactions that occur every year. Common carriers, such as APL or the members of the *amicus* P&I clubs, offer their services at competitive rates to shippers throughout the world who wish to have their goods carried by sea. Literally millions of times each year, an ocean carrier agrees to transport a shipper's cargo to or from the United States on standard terms. There is a simple reason why such a high proportion of the nation's imports and exports are carried by sea: compared to the value of the goods, compared to the service performed, or

compared to the price of alternative methods of transportation, the costs of ocean shipment are relatively low.

One reason that an ocean carrier's freight charges are so low is that transactions are highly standardized. The parties do not individually negotiate the terms and conditions under which the transportation will take place, any more than the cruise line passengers in *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991), negotiated the terms of their individual tickets. Indeed, no large-scale business with a high volume of relatively inexpensive transactions can afford to negotiate the terms of each contract individually. Ocean carriers respond to this situation in the same way as other businesses: they draft standard-form contracts which govern the terms and conditions under which they are willing to perform their services. In the United States, these contracts, which are typically evidenced by bills of lading, are governed by the Carriage of Goods by Sea Act ("COGSA") 46 U.S.C. app. §§ 1300-1315, and the Harter Act, 46 U.S.C. app. §§ 190-196, and are subject to regulation by the Federal Maritime Commission.

APL's standard-form bill of lading is typical for the industry, particularly with respect to the clauses at issue in this case. Virtually every bill of lading in the U.S. trade contains a clause paramount similar to APL's. For shipments *from* the United States, section 13 of COGSA requires the bill of lading to include a clause paramount reciting that the bill "shall have effect subject to the provisions of th[e] Act." 46 U.S.C. app. § 1312; *see generally* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 185-186 (2d ed. 1975). Although the statute does not require the clause paramount to extend

COGSA's applicability to the pre-loading and post-discharge periods, most carriers nevertheless do so. This may seem surprising, given that COGSA generally imposes more liability on a carrier than it would be required to assume under the Harter Act. *See* Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. MAR. L. & COM. 1, 37 & nn.292-295 (1991). But carriers are usually willing to accept somewhat higher liability in return for the uniformity, certainty, and predictability that they should be able to achieve by having COGSA – the U.S. enactment of an international uniform law treaty commonly known as the "Hague Rules"[1] – apply during the entire period that they have control of the goods.

The time-for-suit clause in APL's bill of lading is also typical. In substance, it repeats the fourth paragraph of section 3(6) of COGSA, 46 U.S.C. app. § 1303(6), and article 3(6) of the Hague Rules. It has thus been endorsed by Congress and the international community. Even before COGSA's enactment, U.S. courts recognized and enforced time-for-suit clauses, some of which were as short at three months. *See e.g., United States v. A.C. Monk & Co.*, 57 F.2d 1015, 1018 (3d Cir. 1932); *Schnell v. United States*, 30 F.2d 676, 677 (2d Cir. 1929), *cert. denied*, 279 U.S. 858 (1929); *Ikuno v. Morris & Co.*, 22 F.2d 140, 142 (4th Cir. 1927), *cert. denied*, 276 U.S. 626 (1928); *see also Armour & Co. Aktieselskab v. Gjerduldsen*, 15 F.2d 553, 554 (4th Cir. 1926) (enforcing six-month time-for-suit clause); *Olivier Produce Corp. v. United States*, 20 F.2d 214, 215 (W.D. Wash.

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[1] Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155.

1927) (same). In light of this history, it is hardly surprising that virtually every bill of lading in the world provides for a time-for-suit limitation.

Finally, APL's decision to file its standard-form bill of lading with the Federal Maritime Commission as part of its tariff was routine. Every carrier in the U.S. trade is required by law to do so. *See* Shipping Act of 1984, § 8(a)(1)(E), 46 U.S.C. app. § 1707(a)(1)(E).

Not only is the legal situation presented by this case entirely typical in the shipping industry, the relevant[2] factual background is also typical. With millions of shipments going to and from the United States by sea each year, it is inevitable that some cargo will be delayed, mishandled, damaged, or lost. Although there are losses at sea, most losses occur during loading and unloading (when cargo is subject to the risks of handling), shortly before the cargo is loaded or shortly after it is unloaded (when it is awaiting further movement, and thus less likely to be so well protected as it is on board the vessel), or when it is in storage in the port area (and thus exposed to land-based theft risks that are less common on the high seas). In short, losses during the pre-loading or post-discharge period – when COGSA generally applies as a matter of contract rather than with the force of law – are normal in the industry.

The only thing unusual about this case is the position taken by the courts before in resolving a very typical

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[2] Certain aspects of this case in the lower courts were unusual, but those aspects have nothing to do with the issues currently before the Court.

dispute between a shipper and a carrier. The Eighth Circuit, along with the Eleventh Circuit, has departed from the long-accepted view that filed tariffs are binding on shippers. This conclusion is in tension with decisions of this Court and in open conflict with a decision of the First Circuit and decisions in the Fifth Circuit. The Eighth Circuit's position on the so-called "fair opportunity" doctrine is more extreme than that taken in the other seven circuits to have addressed the issue (and those seven circuits were already in irreconcilable conflict).

Because the legal framework and the relevant factual situation is so typical of so many cases, the current case offers an ideal vehicle to resolve the issues presented in a context that will be applicable to the entire shipping industry.

2. The Decision Below Places an Unreasonable Burden on the Entire Shipping Industry

Petitioners have already explained the importance of resolving the conflicts presented by this case, and *amici* endorse those arguments. *Amici* stress, however, that the importance of resolving the conflicts is by no means limited to APL. When the Court considers the position of *amici* and their members, it will see that resolution of these conflicts is far more important than that. Whereas APL has offices in 40 different foreign countries, *see* Petition at 22, *amici* and their members do business in virtually every maritime country of the world. Their ships call at every port in commercial service. The problems associated with disuniformity are even more serious in this broader context.

Quite apart from the serious problems created by the intercircuit and international conflicts at issue in this case, the decision below places an unreasonable burden on the entire shipping industry. Under the Eighth Circuit's decision, a carrier cannot rely on its contractual rights unless it individually negotiates the terms of each bill of lading with each shipper.[3] This would be comparable to telling a department store that it must bargain with its customers over the terms of every sale, or telling a credit card company that it must obtain its cardholders' agreement on the conditions of each extension of credit, or telling an airline that its ticket terms are unenforceable unless its passengers "accept" them before each flight.

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[3] APL was able to rely on its contractual rights with respect to the first shipment because it issued the bill of lading promptly after loading and respondent negotiated the bill to a bank almost immediately. ("Negotiation," in this sense, refers to the process by which a holder transfers a document of title. *See generally* UNIFORM COMMERCIAL CODE § 7-501.) As petitioners explain, however, a carrier is not always in a position to issue the bill of lading promptly after loading. *See* Petition at 11-12. And even when carrier can issue the bill of lading promptly, it has no control over how quickly a shipper negotiates the bill to a third party. If the goods are damaged during loading, the shipper may never negotiate the bill of lading – if one is even issued. *Cf. Caterpillar Overseas, S.A. v. Marine Transport, Inc.*, 900 F.2d 714 (4th Cir. 1990) (no bill of lading was issued because the cargo was damaged before loading; case resolved on the basis of clauses in standard-form bill of lading that would have been issued but for the damage). If the goods are consigned to an affiliated company, there would be no need to negotiate the bill. The Eighth Circuit offers no clue as to how a shipper might "accept" the terms of a bill of lading other than by agreeing to them individually or by negotiating the issued bill to a third party.

This is simply not the way that business works, nor should it be. Department store customers, holders of credit cards, and airline passengers all know that their transactions are governed by standard terms, and that they can obtain a copy of these terms if they care to know what they are. As a multi-national business,[4] respondent should be held to at least as high a standard here. Respondent clearly knew that it had a contract with APL. (There would be no basis for its present lawsuit otherwise.) Perhaps it actually knew of the one-year time-for-suit provision that was part of this contract (because such a term is both a part of COGSA and typical in the industry); the only other plausible scenario is that it did not care about terms of this sort (because it could so easily have learned what the terms were, either by asking APL or by consulting the filed tariff). In either case, it is unreasonable not to hold respondent to the terms of the contract.

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[4] By the very nature of the industry, the shippers with whom *amici* and their members deal are almost inevitably multi-national businesses. The unreasonableness of the Eighth Circuit's decision can be illustrated in this context by considering the trip that Joseph Kopstein, respondent's president, took to China in November 1988 "to find the missing resin from the [first] two shipments." 32 F.3d at 1247; Petition, Appendix A, at A-3. As an individual passenger, he did not expect to negotiate with his airline over the terms and conditions on his ticket. He may have paid for this ticket with a credit card, but he did not expect to negotiate with his bank over the terms and conditions on which he would make payment. Why did he expect his company to receive more "consumer protection" for its plastic resin (as the Eighth Circuit held with respect to the second shipment) then he as an individual consumer did for himself?

Finally, it is worth noting that the Eighth Circuit's burden is so unreasonable that it applies with respect to each bill of lading, not with respect to each shipper. In the present case, the court below held that respondent had "accepted" the terms and conditions on the first bill of lading, including the time-for-suit provision. Presumably this means that the court recognized that respondent was properly bound by all of the provisions in the first bill of lading and that it had received sufficient notice of these terms. But when the court considered the second, third, and fourth shipments, all of which were on precisely the same terms in every relevant respect, it held that respondent was no longer bound because it had not received proper notice!

Requiring *amici* and their members to give second, third, and fourth notices, when first notices have already been properly received, serves no purpose whatsoever. It is simply another indication of how the decision below, if allowed to stand, will increase the costs of the system for everyone. Either carriers will go through with the pointless exercise, raising their rates to cover the cost, or carriers will operate under the risk of higher liability, once again raising their rates to cover the cost. All of these costs will ultimately be borne by the consumers who purchase goods carried by sea (or manufactured from raw materials carried by sea), and we will all be the losers.

3. The Existence of the "Fair Opportunity" Doctrine Places an Unreasonable Burden on the Entire Shipping Industry

Amici agree with petitioners that there is no legitimate basis for the so-called "fair opportunity" doctrine, and that this Court should reject the requirement and bring the United States into line with the rest of the world's maritime nations. *See* Petition at 14. Even if the Court does not consider this case an appropriate vehicle to reject the doctrine, however, it can at least minimize the intercircuit conflict by ruling on the tariff issue. Indeed, holding that a tariff provides constructive notice of the terms and conditions on file would for all practical purposes resolve most of the fair opportunity cases that have so troubled the lower courts until now.

Petitioners have already explained the importance of resolving the "fair opportunity" conflict. Once again, *amici* endorse these arguments and add only a few observations. First, the burden of the doctrine is far greater for *amici* than it is for APL. While it is a real burden for APL to deal with the intricacies of the doctrine in each circuit that has ruled on it, particularly when the U.S. courts are also in conflict with decisions in foreign countries where APL does business, at least APL's task is limited to considering how the doctrine affects its particular bill of lading. *Amici* are forced to deal with the same conflicts, but with respect to the bills of lading issued by each of their members.

Second, the mere existence of the doctrine imposes a burden on the shipping industry. Even if there were no true conflicts among the circuits (which is, unfortunately,

not the case), the existence of the doctrine encourages cargo plaintiffs with no legitimate basis for a claim to allege a violation of the doctrine in hopes of obtaining a favorable settlement or convincing a court to expand the doctrine. Most of these attempts have failed. *See, e.g., Henley Drilling Co. v. William H. McGee & Co.*, 36 F.3d 143 (1st Cir. 1994) (rejecting a proposed expansion of the fair opportunity doctrine); *Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897 (9th Cir. 1989) (same); *General Electric Co. v. M/V Nedlloyd*, 817 F.2d 1022 (2d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988) (same). Although the carriers and their P&I clubs in such cases ultimately prevailed, the costs of defending the suits constitute a needless expense for the industry in which no one wins and everyone (including the court system) loses. The occasional decision, such as that below, in which a claimant succeeds in expanding the doctrine will encourage further rounds of pointless litigation unless this Court steps in to correct the problem.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

CHESTER D. HOOPER
Counsel of Record
HAIGHT, GARDNER, POOR
& HAVENS
195 Broadway
New York, New York 10007
(212) 341-7244

Attorney for Amici

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